IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 49

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

ELVIN L. REDDISH, ET AL.,

Appellees.

Appeal from the United States District Court
for the Western District of Arkansas

APPELLANTS' BRIEF

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OPINIONS BELOW

The opinion of the District Court (R. 398) is reported in 188 F. Supp. 160, the report of the Interstate Commerce Commission (R. 385) in 81 M.C.C. 35.

JURISDICTION

Probable jurisdiction was noted April 17, 1961, 365 U.S. 877 (R. 421). This is an appeal under 28 U.S.C. § § 1253 and 2101(b) from a final judgment of the District Court entered October 19, 1960 (R. 411), that permanently enjoined en-

forcement of an order of the Interstate Commerce Commission. Notice of appeal was filed December 16, 1960 (R. 416).

Associated Cases

By the order noting probable jurisdiction the Court consolidated this case with Nos. 53 and 54, which are separate appeals from the same judgment by the Commission and by Arkansas-Best Freight System and others (R. 421).

Statutes Involved

This appeal is concerned largely with the construction of the amendments of August 22, 1957, to § § 203 (a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. § § 303(a)(15), 309 (b), 71 Stat. 411-412, Public Law 85-163, and also involves construction of the National Transportation Policy, 49 U.S.C. preceding § 1, 54 Stat. 899. These statutes are set forth in the Appendix, p. 53, with the changes made by the 1957 amendment fully shown.

Questions Presented

The Commission denied an application for motor contract carrier authority under § 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), on the grounds (1) that the service proposed can be performed adequately by existing motor common carriers and rail carriers, (2) that since the existing service is adequate the supporting shippers would not be adversely affected by denial, (3) that carriers providing adequate services would be adversely affected by a grant of new authority, and (4) that the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service. In setting aside the order the District Court held that the 1957 amendment to § 209(b) forbids consideration of

adequacy of existing service. With the background of this statutory construction, the Court held that denial would adversely affect the supporting shippers in respect of service and rates and that a grant would not adversely affect protesting carriers.

The questions presented are:

1. Whether the 1957 amendment to § 209(b) precludes consideration of existing service of motor and rail carriers in determining whether denial of an application for contract carrier authority would adversely affect supporting shippers.

2. Whether the District Court erred in setting aside the Commission's findings:

(a) That the service proposed can be performed adequately by existing motor common carriers and rail carriers.

(b) That denial of the application would not adversely affect the supporting shippers.

(c) That a grant of authority would adversely affect existing carriers.

(d) That the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service.

STATEMENT OF THE CASE

Proceedings Below

Appellee E. L. Reddish filed an application under § 209 (b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), for a permit to engage in the business of contract carrier by motor vehicle (R. 23-36). The application was opposed by appellant railroads and motor common carriers (R. 387).

After a hearing the Examiner issued a proposed report and order recommending grant of the application on the general ground that need for the service had been shown (R. 365). The protesting carriers filed exceptions (R. 387). The Commission, Division 1, denied the application, 81 M. C. C. 35, on the grounds that since existing transportation service is adequate denial would not adversely affect supporting shippers but would adversely affect existing carriers, and that the comparative level of proposed and existing motor carrier rates is not material (R. 385). The entire Commission denied applicant's petition for reconsideration (R. 396).

Reddish then instituted this suit in the District Court under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, to set aside the order (R. 1). The railroads and protesting motor carriers intervened in defense (R. 399). The Court annulled the order and remanded to the Commission, 188 F. Supp. 160, holding that the 1957 amendment to § 209(b) forbids consideration of adequacy of existing service, that denial would adversely affect supporting shippers, and that granting the application would not adversely affect existing carriers (R. 398). The Commission, the railroads, and the motor carriers took separate appeals (R. 412, 416, 418), and this Court noted probable jurisdiction (R. 421).

EVIDENCE

Reddish and Steele Canning Company

Reddish sought authority (1) to carry canned goods from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to points in 33 states, and (2) in the reverse direction to carry canned goods and materials and supplies used in the manufacture of canned goods from 30 of these states to the 4 points in Arkansas and Oklahoma (R. 38-39, 386). The service would be performed under

continuing contracts with Steele Canning Company of Springdale and Lowell, with Cain Canning Company of Springdale, and with Keystone Packing Company of Fort Smith, all in Arkansas (R. 39). Canned goods would be picked up for Steele as shipper at the Baron Packing Company in Westville, Oklahoma (R. 116).

From 1948 to June, 1958, Steele shipped its products outbound by motor common carrier, railroad, and its own private trucks (R. 134-135). From time to time it increased the number of its private trucks to take care of its growing small order business (R. 135). In 1957 and the first half of 1958 3 to 5 per cent of its outbound traffic moved by railroad, about 17 to 20 per cent by common carrier trucks, and the balance, nearly 80 per cent, moved by trucks operated by Steele in private carriage (R. 207-209). In January, 1958, Steele was operating 29 tractor-trailer combinations in its private carriage, 13 combinations being owned by Steele and the rest being leased to Steele by various owners including E. L. Reddish (R. 157). Reddish was leasing 9 combinations to Steele early in 1958 under leases for one year with provisions for cancellation by either party on 30 days notice (R. 51).

Reddish had commenced leasing vehicles to Steele in 1953 with 3 vehicles, and thereafter leased additional vehicles to Steele from time to time; Reddish maintained the vehicles and supplied gas, oil, and tires, and was paid on a mileage basis; Steele hired, discharged, and supervised the drivers and carried public liability insurance on the vehicles (R. 50-52). Before 1940 Reddish worked as an assistant to his father in the latter's motor common carrier business, which was sold in 1940; thereafter he worked as a truck driver and mechanic and for several years before 1953 he was operating 3 combinations in the transportation

of exempt commodities until he leased the combinations to Steele (R. 49-50).

Early in 1958 Steele and its truck drivers had a labor dispute, and in March of that year in an election supervised by the National Labor Relations Board the drivers voted to make the Teamsters Union their bargaining agent, pursuant to which the Board so certified the Union (R. 158, 200). A further labor dispute was followed by a strike of drivers and picketing of the Steele plants; the strike has continued and Steele and the Union have not entered into an employment agreement (R. 158-159, 169).

The strike severely curtailed Steele's transportation operations beginning about May, 1958 (R. 57, 159-161). As a result Steele suggested to Reddish that the instant application for contract carrier authority be filed, and it was filed May 13, 1958 (R. 57). Reddish also applied for emergency operating authority to perform the proposed operations for Steele and this was granted on June 13, 1958 (R. 58). Reddish has been operating under emergency and temporary authority since that time, using the nine tractor-trailer combinations formerly leased to Steele; the leases were terminated and he no longer has any vehicle equipment under lease to Steele (R. 52-53, 58, 204). Reddish employs 19 drivers, all of them non-union drivers (R. 58, 72).

Steele still operates 8 combinations in private carriage, 5 owned and 3 leased (R. 159, 163, 169, 207). Since the strike began substantially the same outbound traffic pattern has continued, about 80 per cent by Steele's and Reddish's vehicles and almost 20 per cent by motor common carrier (R. 209).

Steele's products are sold through food brokers to wholesalers, chain stores, and the larger supermarkets (R. 125). Steele arranges for the transportation to customers

(R. 126). About 80 per cent of the customers buy in orders from 3,000 to 10,000 pounds per order, the minimum order which Steele will ship being 3,000 pounds which represents 100 cases (R. 126). The customers are located in the 33 destination states (R. 126). The small volume business is one of the best sources for Steele's sales; these customers work on a ten-day supply of canned goods and Steele must supply these goods on that basis in order to meet competition; some customers do not have warehouse space or financial backing to stock larger amounts (R. 127). Some customers specify the day of the week or the time of day when they want their merchandise delivered (R. 128).

Steele uses Jones Truck Line, Inc., of Springdale, for most of the traffic it ships by motor common carrier; this consists of straight truckload shipments and many shipments that have a destination and two intermediate stops (R. 132-134). Steele uses Jones because Jones' principal office is at Springdale (R. 134, 199). Jones arranges for interline with other truck lines where Jones' line does not extend to the destination points, and Steele does not know who these interlining motor carriers are (R. 187, 192-193, 210-211). Steele has not investigated and has no knowledge of the services available from motor carriers who do not render direct service to Springdale (R. 185, 187).

Steele's vice-president and general manager testified that in their experience the only way they have found it possible to use motor common carriers on the small orders ranging from 3,000 to 10,000 pounds is to ship them in less-truckload lots, and that at their destination points it is impossible to get quick service on common carrier l. t. l. shipments (R. 133). For this reason, he said, as a necessary means for holding their business, Steele developed its fleet of private carrier trucks to deliver these small orders (R. 134-135). Steele's competitors, he said, deliver a portion

of their products by means of their own private trucks (148). The labor dispute with their truck drivers and the election and designation of the Teamsters Union as the drivers' bargaining agent, he testified, caused Steele to decide to get out of the private carriage business as soon as possible and to promote the filing of Reddish's application (R. 159-163). He feels that the proposed Reddish service is necessary to the continuing of Steele's operation on its present scale (R. 165-166). He further stated that freight rates on motor common carrier less-truckload shipments are prohibitive (R. 173).

The only evidence in the record as to the rates which Reddish proposes to charge and as to motor common carrier rates is the following. Certain rates are shown from Springdale to 4 Ohio points (R. 83-84, 353-354), and certain of Reddish's rates are the same as motor common carrier rates for the same service (R. 191). There is no evidence in the record showing the ability of Reddish to operate under whatever rates he proposes to charge.

Steele has made no attempt to inform itself as to the services and rates of a large number of motor common carriers serving substantially all of the involved territory (R. 153-155, 185-188, 192, 201, 210-211, 375-380, 391-392). These carriers and the rail carriers introduced evidence as to their facilities and their ability to carry the traffic involved (R. 270-363, 375-380, 391-392).

Steele supports Reddish's application for authority to perform the inbound transportation of materials and supplies because limited warehouse space makes it necessary to correlate these movements with the outbound traffic and because it wants to enable Reddish to obtain revenue on the return movements of his equipment (R. 171). The inbound traffic has been carried by producers who sell to

Steele, by Steele's private trucks, by motor common carriers, and by railroads (R. 140-144). During the time Reddish has been operating under the temporary contract carrier authority he has carried exempt commodities on the backhaul (R. 108, 164); and during this time Steele has been carrying practically all of its own inbound traffic in non-exempt commodities in the trucks it operates in private carriage (R. 188, 203, 209-210).

Reddish will not dedicate any piece of his equipment to any one of the three supporting shippers but will alternate his equipment among the three on outbound movements; on inbound trips Reddish will haul exempt commodities for other shippers and these other shippers will pay the freight charges on the exempt commodities (R. 107-108).

Cain Canning Company

Before the strike at Steele Canning Company 85 per cent of Cain Canning Company's products were sold to Steele, and the remainder to other canners (R. 213-214). These buyers picked up their merchandise at Cain's plant and Cain furnished no transportation and had no trucks of its own (R. 214-215). Cain's plant is not on a rail siding (R. 215). Since the strike Cain has been carrying canned goods to the Steele plant in Cain's trucks and has been making direct sales to customers and using Jones Truck Lines for deliveries, but has not been able to accept small orders because they have no way of moving them in truckload shipments (R. 216-217). Cain supports Reddish's application in order to be able to develop sales of its own (R. 217). If the Reddish application is not granted it is the opinion of Cain's witness that they would have to go into the private carriage business to sell their products because the quantities bought are so small (R. 217-218). Cain supports Reddish's application to haul materials and supplies inbound to Cain's plant

so that Reddish may have backhaul traffic and in order to have prompt inbound service on cans and boxes for which they have limited storage facilities (R. 221).

Cain wants to make direct sales to customers in the territory covered by the Reddish application, but Cain has no knowledge of and has made no investigation of the transportation service available throughout that territory (R. 224-226, 228, 229, 231). Cain's witness expressed the opinion that motor common carrier less-truckload service is not usable because l. t. l. rates are prohibitive (R. 228).

Keystone Packing Company

Keystone Packing Company, Fort Smith, Arkansas, sold Steele 75 per cent of its canned goods before the strike at Steele's; the other 25 per cent was sold direct to customers in many of the states involved in Reddish's application (R. 238-241). The transportation of Steele's 75 per cent was arranged by Steele and was performed by Steele's trucks, railroads, and motor common carriers; of the remainder, 5 per cent of the total output moved by rail and 20 per cent by motor common carrier (R. 243). When the strike curtailed Steele's private carrier operations Keystone bought two new trucks which it has used in delivering its products to customers and this has offset the drop in Steele's purchases (R. 242-243). If Reddish's application is granted Keystone will use that service and will discontinue private carriage (R. 244). They use motor common carriers regularly and have talked with three about service to certain points (R. 244).

Keystone's private carriage shipments are mostly straight truckloads with 2 to 4 drop-offs (R. 245). Many of its customers specify the day and some the hour when they want deliveries made, and Keystone's witness believes that

it is necessary to give this kind of service in order to retain the business (R. 245). The witness feels that the service that Reddish proposes will make possible the deliveries of small orders needed in their business, and that if the application is denied they will have to buy more trucks to make their own deliveries (R. 249-250). Keystone buys its fresh vegetables from producers who deliver them to the canning factory; Keystone wants Reddish's proposed inbound service to bring in cans and the witness believes this service will be faster than rail or motor common carrier service (R. 250-251).

Keystone has no knowledge of and has made no efforts to obtain information about motor carrier or railroad service throughout most of the territory covered by the Reddish application (R. 251-255, 258, 261, 266, 267).

Protesting Carriers

Protesting motor common carriers introduced evidence respecting their territorial authorities and their facilities. These are L. A. Tucker Truck Lines (R. 270, 375); Be-Mac Transportation Co. (R. 271, 376); Wright Motor Lines, Inc. (R. 272-279, 376); Loving Truck Lines (R. 286-292, 377); several associated and commonly managed corporations known as Buckingham Freight System (R. 301-305, 377); Watson Brothers Transportation Company (R. 308-312, 378); Frisco Transportation Company (R. 314-317, 378); Arkansas Best Freight System, Inc. (R. 321-326, 379); East Texas Motor Freight Lines, Inc. (R. 336-341, 379); Gillette Motor Truck Lines and Western Truck Lines, the former being a subsidiary of the latter (R. 346-354, 380). Nelsen Brothers, a partnership, and a contract carrier, introduced similar evidence (R. 272, 376). Western Pacific Railroad Company (R. 328-331, 380); Denver & Rio Grande Western Railroad Company (R. 334, 380); Great Northern Railroad

Company (R. 359-361, 380); Atchison, Topeka and Santa Fe Railway Company (R. 361-363, 381); introduced similar evidence.

Each of the protesting motor carriers has authority to carry canned goods and the other commodities here involved (R. 391). Wright, Loving, Frisco, and Arkansas-Best each serve directly one or more of the four origin points of Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma (R. 274-275, 289-290, 315, 325). They have authority collectively to carry canned goods from these origins directly to points in Colorado, New Mexico, Oklahoma, Nebraska, Missouri, Kansas, Ohio, Indiana, Illinois, Texas, Tennessee, Mississippi, Louisiana, and Arkansas (R. 274-276, 289-291, 315-316, 322-324).

These originating carriers can by interline with each other and with Tucker, Be-Mac, Buckingham, Watson, East Texas, and Gillette-Western provide service from the four origin points to points in Iowa, Wisconsin, Minnesota, North Dakota, South Dakota, California, New Mexico, Arizona, Wyoming, Montana, Nevada, and also points in the states first named (R. 375-376, 275, 279, 289, 302-305, 309-311, 316, 324-325, 337-341, 349-352).

Wright, Loving, Frisco, and Arkansas-Best have equipment available daily in Arkansas and Oklahoma and operate daily schedules (R. 277, 290, 316, 322). The protesting motor carriers are performing split-load and multiple pick-up and drop-off services for others satisfactorily and believe they can provide adequate service for the supporting shippers (R. 278-279, 290-292, 303-305, 310-311, 316-317, 325, 340, 354). They can carry inbound freight such as sugar, salt, cans, cartons, labels and canned goods to the four origin points (R. 275-276, 291, 304, 311, 317, 326, 340-341, 354).

Western Pacific Railroad, Denver & Rio Grande, Great

Northern, and Santa Fe on their own lines and in interline with other railroads operate extensively throughout the involved territory (R. 380-381, 392). They have carried canned goods, sugar, cans, crates, salt and caustic soda in the area concerned and provide stop-off in transit and other special services; this is highly valuable traffic for them which they need to retain (R. 330-331, 335-336, 360, 362-363, 144). Railroads have carried about 5 per cent of the outbound traffic of Steele and Keystone (R. 207, 243) and a larger proportion of their inbound freight (R. 144, 251, 392).

SUMMARY OF ARGUMENT

I

Section 209(b) of the Interstate Commerce Act, prior to 1957, required as the standard for grant of a motor contract carrier permit "that the proposed operation . . . will be consistent with the public interest and the national transportation policy." The 1957 amendment provides that in making this determination the Commission shall consider five criteria, among them "the effect which denying the permit would have upon the . . . shipper." The Commission denied Reddish's application upon the ground, among others, that since the existing services of motor common carriers and rail carriers are adequate for the shippers' needs denial would not adversely affect the shippers. The District Court held that the adequacy of existing service test "is a test proscribed by the legislative history" of the 1957 amendment. The Court held, relying on legislative history, that the five criteria established new and exclusive standards for determination of § 209(b) applications.

The Court erred in three particulars. (1) The criterion of the 1957 amendment, "the effect which denying the permit would have upon the . . . shipper" so plainly includes as an inseparable element the question of adequacy of existing service that resort to legislative history for construction is not permissible. (2) The five criteria of the 1957 amendment did not establish exclusive standards and did not destroy the principle of twenty years standing that in determining whether a contract carrier permit shall be issued the Commission must consider the adequacy of existing services of motor common carriers and rail carriers. (3) Even if legislative history is consulted it does not support the District Court's conclusion.

The "legislative history" on which the District Court relied is the following. The 1957 amendment as introduced and as recommended by the Interstate Commerce Commission would have made issuance of a permit dependent upon a finding "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." Contract carriers, some shippers, and others objected to this provision and in the course of passage it was stricken and the five criteria substituted for it. The Commission, motor common carriers, and rail carriers agreed to this change. The Court held that there was no difference between the deleted willingness and ability test and the adequacy of existing service test which the Commission applied.

The criterion here in question, "the effect which denying the permit would have upon the . . . shipper," (or user of service) has always been a basic and central test to be applied in considering an application for entry into a regulated field of business. And the prime standard for determining that test has always been whether existing service is adequate. The criterion of the statute and adequacy of existing service are inseparable concepts. *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 90 (1957); *American Trucking Associations* v. *United States*, 364 U. S. 1, 13, 14-15 (1960). Many other cases decided by this Court during the past 35 years have so held.

The criterion of the statute is thus a term of art which includes as part of its fixed meaning the question of the adequacy of existing service. In such a case the fixed meaning of the term of art prevails and legislative history may not be consulted for the purpose of finding a different meaning. *Morrissette* v. *United States*, 342 U. S. 246, 263 (1952); *Packard Motor Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492 (1947); and other cases.

The foregoing rests on the argumentative assumption that the District Court was correct in holding that the five criteria established new and exclusive standards. However, it is clear that the Court erred in so holding. The five criteria are no more than aids in the determination of the pre-existing standards comprised within the phrase of § 209(b), "consistent with the public interest and the national transportation policy." Enactment of the five criteria did not wipe the slate clean of all pre-1957 standards for the determination of applications under § 209(b) that had been developed by 20 years of administrative and judicial construction. *American Trucking Associations* v. *United States, supra,* 364 U. S. 1. Among the oldest of those standards, and one followed with absolute consistency, is that an application for contract carrier authority will be denied where existing service of motor common carriers and railroads is adequate. This principle clearly still survives if for no other reason than that it is wholly harmonious with the five criteria. There is nothing in the text of the statute that lays any ground for the claim that this long established rule was destroyed by enactment of the five criteria.

But even if legislative history is consulted it does not support the Court's conclusion; instead it is evidence of the Court's error. There is positive evidence that the Senate and House Committees on Interstate and Foreign Commerce who dealt with the 1957 amendment to § 209(b) were aware of the use of the adequacy of existing service test in denying contract carrier applications and of its importance and necessity in the regulation of all classes of carriers. This evidence shows that these Committees did not intend to do away with this test by the 1957 amendment.

During the few weeks while the Committees were considering the amendment to § 209(b) they were simultane-

ously formulating an amendment to the Freight Forwarder Act, 49 U. S. C. §§ 1001 *et seq.*, that would make the adequacy of existing service test a standard to govern the issuance of freight forwarder permits under that act. Their reports recommending that amendment for passage recited that the Commission can deny a contract carrier application on the ground of adequacy of existing service, that this practice is necessary in the regulation of all carriers, and that it ought to be extended to freight forwarders. S. Rep. 542, H. Rep. 880., 85th Cong. 1st Sess. The freight forwarder amendment was passed. Nowhere in the history of the amendment to § 209(b) is any intent manifested to do away with the adequacy of existing service test. It is inadmissible that the Committees who extended the test to freight forwarders so clearly and in emulation of § 209(b) intended to withdraw the test from § 209(b), in the absence of language specifically saying so.

II

The Commission found that the service proposed can be performed adequately by existing motor common carriers and rail carriers and that denial of the application would not adversely affect the supporting shippers. These findings are in response to two criteria of the 1957 amendment, "the nature of the service proposed" and "the effect which denying the permit would have upon the . . . shipper." The evidence fully supports these findings; they are clearly within the administrative discretion conferred upon the Commission by § 209(b); and the District Court erred in setting them aside.

Steele Canning Company, the principal supporting shipper, had been transporting 80 per cent of the canned goods it sold in its own private trucks. The goods so carried

included Steele's canned goods and canned goods purchased by Steele from Cain Canning Company and Keystone Packing Company, 85 per cent of Cain's output and 75 per cent of Keystone's. A strike of Steele's drivers due to Steele's failure to enter into a contract with them severely curtailed this private carriage, and caused Steele to ask Reddish to file his application for contract carrier authority.

At the time of the strike the three supporting shippers had no knowledge of the services available in most of their sales territory from the protesting motor common carriers, due to the fact that they had been relying upon Steele's private carriage for transportation of most of their output. The goods carried by Steele consisted of orders ranging from 3,000 to 10,000 pounds, and the supporting shippers expressed the opinion that private carriage or Reddish's proposed service was necessary to give adequate service to customers.

The protesting motor common carriers introduced extensive evidence of their authorities and facilities and set forth their ability and willingness to perform the services required by the supporting shippers. The protesting railroads introduced similar evidence. Because of the manifest lack of knowledge of the supporting shippers as to existing services and the showing made by the protesting carriers as to their ability to give adequate service, the Commission's findings as to adequacy of existing service are correct and the District Court erred in setting them aside. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946).

The Commission found, in response to another criterion of the 1957 amendment, that granting the permit would have an adverse effect upon the protesting carriers. The

District Court set this aside on the ground that the supporting shippers had testified that if the application was denied they would not ship by the protesting carriers but would use private carriage instead. The Court erred. *American Trucking Associations* v. *United States*, *supra*, 364 U.S. 1, 18.

The District Court set aside the Commission's finding that the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service. The Court said that rate comparisons are not always material, but held that they are here. In the first place, there is no evidence as to the rates of Reddish or of the motor common carriers applicable in most of the involved territory. Nor is there any evidence of the ability of Reddish to operate at any particular rate level; there must be proof of ability in this regard to support any rate comparisons.

Motor common and contract carriers belong to the same mode of transportation within the meaning of *Schaffer Transportation Co.* v. *United States*, *supra*, 355 U.S. 83. In *Schaffer* the Court apparently recognized the validity of the Commission's longstanding principle that rate comparisons are not material when one motor carrier seeks to invade the territory of another. This principle has governed for many years where a contract carrier applies for territory adequately served, as here, by motor common carriers.

ARGUMENT

I.

SECTION 209(b) OF THE INTERSTATE COMMERCE ACT AS AMENDED IN 1957 AUTHORIZES THE COMMISSION TO DENY A CONTRACT CARRIER APPLICATION ON THE GROUND THAT THE EXISTING TRANSPORTATION SERVICE IS ADEQUATE.

A.—THE 1957 AMENDMENT TO § 209(b) SO CLEARLY AUTHORIZES THE COMMISSION TO BASE A DENIAL ON ADEQUACY OF EXISTING SERVICE THAT RESORT TO LEGISLATIVE HISTORY FOR CONSTRUCTION IS NOT PERMISSIBLE.

The Commission found upon ample evidence that the existing transportation service is adequate to meet the shippers' requirements, and this was a principal ground for denial of the application (R. 395; 81 M.C.C. at 41-42). The District Court held that the 1957 amendment to § 209(b), when construed in the light of its legislative history, forbids denial on this ground (R. 406; 188 F. Supp. at 165).

The provisions of § 209(b) here relevant are set out below. The numbers in brackets are not in the text but are inserted for convenience of reference and because the District Court and the Commission refer by number to what are called the five criteria added to § 209(b) by the 1957 amendment. Matter added by the amendment is in italics. The pertinent standards for grant of an application are:

> "[1] . . . that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public*

> *interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider* [1] *the number of shippers to be served by the applicant,* [2] *the nature of the service proposed,* [3] *the effect which granting the permit would have upon the services of the protesting carriers and* [4] *the effect which denying the permit would have upon the applicant and or its shipper* [5] *and the changing character of that shipper's requirements. . . .*"

Construing these provisions the Commission said (R. 394; 81 M.C.C. at 41):

> "Section 209(b) also requires us to consider the effect of a denial on applicant and its supporting shipper. . . . Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements."

The District Court held that denial on that ground was forbidden by the 1957 amendment to § 209(b), saying in part (R. 406; 188 F. Supp. at 165):

> "Further, the 'adequacy of existing service' test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act."

By "legislative history" the Court meant the following. The 1957 amendment originally would have made issuance of a permit dependent upon a finding "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." This was stricken in the course of enactment and the five criteria substituted. On this the Court said (R. 407; 188 F. Supp. at 165-166):

> "Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers,

some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

"We do not believe that there is any difference between the 'willingness and ability' test deleted by Congress from the bill proposed by the Commission and the 'adequacy of service' test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. . . ."

In holding that the adequacy of existing service test was "proscribed" by the legislative history of the 1957 amendment the Court erred in two particulars. Section 209(b) as amended authorizes the adequacy of existing service test in language of such plain and well settled meaning that resort to legislative history is not permissible. But even if the legislative history is consulted it does not support the Court's conclusion.

The Court held that the five criteria specified in the 1957 amendment provided new and exclusive standards for determination of contract carrier applications and thus forbade the use of other standards, theretofore employed by the Commission, which had been established by twenty years of administrative and judicial construction (R. 409; 188 F. Supp. at 166-167). This is error. *American Trucking Associations* v. *United States*, 364 U.S. 1, 6, 7, 9, 13, 15 (1960). We will discuss this point more fully later.

But even if the Court were right on this point it does not follow that the Court's ultimate conclusion would be correct. For without anything more the words of the 1957 amendment that the Commission

> ". . . shall consider . . . the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper . . ."

are apt words of art which authorize denial based on adequacy of existing service. The quoted phrase of the statute and "adequacy of existing service" are inseparable concepts.

The criterion of § 209(b), "the effect which denying the permit would have upon the . . . shipper" (user of the service) has long been a central and basic test to be resolved where entry into a regulated business requires government authorization. And administrative agencies and this Court have always held that resolution of this test requires determination whether existing service is adequate.

Indeed, the effect upon the shipper of denying the permit can be assayed in no other fashion than by considering the adequacy of existing service. Thus in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), when dealing with the precise issue of the effect of denial of proposed authority upon shippers, the Court said (p. 90):

> ". . . 'relative or comparative adequacy' of the existing service is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system."

For this reason this Court and the administrative agencies have always considered that "the effect which denying the permit would have upon the . . . shipper" and "ade-

quacy of existing service" express inseparable concepts. This principle was applied in a proceeding under § 209(b) as amended in 1957 in *American Trucking Associations* v. *United States, supra,* 364 U.S. 1. There it was urged in defense of an order granting contract carrier authority to a rail subsidiary that the Commission had found justifying "special circumstances" in the record. As to this the Court said (p. 13):

> "Appellees urge that nonetheless there were 'special circumstances' within the meaning of *American Trucking Associations.* Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications . . . The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted 'special circumstances' under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant.[9] (Emphasis is in original text).

Note 9 sets out part of § 209(b) with the 1957 amendment in italics. Then in further comment on the Commission's findings the Court said (pp. 14-15):

> "There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor."

The "need of General Motors for a service of the type here involved" and "Pacific Motor's experience and qualications" and the question whether "independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor" are principal ingredients of the adequacy of existing service test. Thus the Court in that case, in considering § 209(b) as amended in 1957, re-

ferred to the adequacy of existing service test as one of the "basic determinations which [the Commission] was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant."

In other cases over the past 35 years the Court has uniformly held that probable effect upon the shipper of denying proposed carrier authority and adequacy of existing service are inseparable concepts.[1]

This principle applies not only in permit and certificate cases under §§ 209(b) and 207(a), but also in proceedings under § 5(2) where the proposed unification of two carriers would create a new service competitive with existing carriers. In § 5(2) cases the test is consistency with the public interest. The rule was stated in *Shein* v. *United States*, 102 F. Supp. 320, 326 (N.J. 1951), affirmed 343 U.S. 944:

> "We, therefore, conclude that the Commission applied the right rule of law and had substantial evidence to support its ruling; that there would be a radical change in the pattern of the operations; that there would be a probable adverse effect which this would have on competing carriers; *that there was a lack of evidence to show that the transaction would supply any need of the public not now being adequately met by other carriers;* and therefore concluding that the granting of the transfer would not be consistent with the public interest." (Emphasis added).

Note that the District Court there linked the "need of the public" (the effect of denial upon shippers) to adequacy

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[1] *American Trucking Assns.* v. *United States*, 355 U.S. 141, 153 (1957); *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 240-241 (1945); *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 68-69 (1945); *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 392 (1932); *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277-278 (1926).

of existing service. This concept has been uniformly followed by district courts in § 5(2) cases and affirmed by this Court.[2]

Under the Federal Communications Act, 47 U.S.C. § § 151 *et seq.*, economic injury to an existing radio station is not a ground for denying a competitive application. Nevertheless, the Communications Commission, in determining the effect upon the public (the "shipper") of granting or denying a competitive application, must take into account the adequacy of the existing service with the view to preventing the impairment of existing adequate service that could result from the destructive competition of a new licensee. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475-476 (1940).

It is clear that the phrase of § 209(b), "the effect which denying the permit would have upon the . . . shipper," has always been inseparably linked to "adequacy of existing service," so that resolution of the first phrase is wholly dependent upon determination of the second. The first phrase would lack any consequential meaning unless it included consideration of the second.

Thus when Congress used the phrase "the effect which denying the permit would have upon the . . . shipper" it employed a term of art which included as part of its fixed meaning "consideration of the adequacy of existing service." In such a case the fixed meaning of the term of art prevails and legislative history may not be consulted for the purpose of finding a different meaning. In *Morrissette*

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[2] *Houff Transfer* v. *United States*, 105 F. Supp. 851, 855 (W. D. Va. 1952); *Herrin Transp. Co.* v. *United States*, 108 F. Supp. 89, 94-95 (E. D. La. 1952), affirmed 344 U.S. 925; *Ratner* v. *United States*, 162 F. Supp. 518, 519 (S. D. Ill. 1957), affirmed 356 U.S. 368.

v. *United States*, 342 U.S. 246, 263 (1952), the Court said in holding resort to legislative history not permissible:

> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."

In *Case* v. *Los Angeles Lumber Products Company, Ltd.*, 308 U.S. 106, 115 (1939), the Court said:

> "The words 'fair and equitable' as used in § 77B(f) are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, *Duparquet Huot & M. Co.* v. *Evans*, 297 U.S. 216, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Keck* v. *United States*, 172 US 434, 446."

In *Packard Motor Co.* v. *National Labor Relations Board*, 330 U. S. 485 (1947), the question was whether the word "employee" as used in the National Labor Relations Act includes foremen. Opponents of such inclusion pointed to statements of members of Congress to the effect that the Act would not cover foremen. Nevertheless, the Court held that prior to passage of the Act the word "employee" had always included foremen in its meaning, and that resort to legislative history could not be had to reach a contrary result. The Court said (p. 492):

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen

> was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

Precisely to the same effect are *Gemsco* v. *Walling*, 324 U. S. 244, 260 (1945) and *Ex Parte Collett*, 337 U. S. 55, 61 (1949).

This rule applies even in the face of inferences, which are wholly lacking here, that Congress may have used the term mistakenly or inadvertently. Thus in *Unexcelled Chemical Corp.* v. *United States*, 345 U. S. 59, 64 (1953), the Court said:

> "Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings subject matter into a statute, its word is final . . ."

Congress plainly used language in the amendment which called for consideration of adequacy of existing service, and its word is final and not open to construction based on legislative history.

Nevertheless, if legislative history is consulted it does not support the District Court's conclusion. We discuss this point in sub-part C, *infra*, p. 32.

B.—THE FIVE CRITERIA OF THE 1957 AMENDMENT TO § 209(b) DID NOT ESTABLISH EXCLUSIVE STANDARDS FOR THE DISPOSITION OF APPLICATIONS AND DID NOT IMPAIR THE PRE-1957 PRINCIPLE THAT DENIAL MAY BE BASED ON ADEQUACY OF EXISTING SERVICE.

This sub-part B does not overlap the position taken in our

preceding sub-part A. There we pointed out that even assuming the correctness of the Court's holding that the five criteria of the amendment established exclusive standards, an application could, nevertheless, be denied on the ground of adequacy of existing service because that phrase is the principal and indestructible element of the 4th criterion, "the effect which denying the permit would have upon the . . . shipper." Here we submit that the five criteria did not establish exclusive standards and thus did not impair the pre-1957 principle that denial may be based on adequacy of existing service.

On this question the District Court said of the amendment (R. 409; 188 F. Supp. at 167), quoting as authority *J-T Transport* v. *United States,* 185 F. Supp. 838, 849 (1960):

> "It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application."

The Court erred in that conclusion. *American Trucking Associations* v. *United States, supra,* 364 U. S. 1. There it was held that the specification of the five criteria in the 1957 amendment did not preclude the use of standards for the determination of railroad applications for motor carrier authority that had been developed by twenty years of administrative and judicial construction of §§ 5(2)(b) and 207 and which had been judicially transplanted in § 209. The Court so held despite the total lack of identification or

resemblance textually between the five criteria of the amendment and the decisive 20 years-old principles relied upon in *American Trucking*. Thus the Court clearly held that the enactment of the five criteria did not wipe the slate clean of all pre-1957 standards for determination of an application under § 209(b). And as we have pointed out above, the Court recognized in *American Trucking* the propriety of the adequacy of service test under § 209(b) as amended, either as a pre-1957 standard or as an element of the 4th criterion of the amendment or perhaps as a combination of both factors.

Before 1957 the statutory test for disposition of § 209(b) applications was consistency "with the public interest and the national transportation policy," and the prime standard for determination was adequacy of existing service. A concise statement of this principle appears in *Wilson* v. *United States*, 114 F. Supp. 814, 822 (W. D. Mo. 1953):

> "In light of the foregoing, we believe there was substantial evidence before the Commission from which it could find and conclude that the supporting shipper has available motor carrier service for the transportation of 'frozen eggs and frozen poultry' to all points to which service is desired so as to sustain the conclusion of the Commission that 'the proposed operation (would not) be consistent with the public interest and the national transportation policy.'"

The principle so expressed has governed the administration of § 209(b) ever since its enactment. In *C. & D. Oil Company Contract Carrier Application*, 1 M.C.C. 329, 331 (1936), where the application was opposed by motor common carriers and railroads the Commission said:

> "This case presents squarely for our consideration the question of whether the desire of a shipper to engage the services of a particular person as a contract

carrier, standing alone, constitutes a sufficient ground for the granting to that person of the right to enter the trucking field, even though the traffic proposed to be transported is now handled satisfactorily by existing trucking facilities. In our opinion, the granting of the permit sought on this ground alone would not be consistent with the public interest or with the policy declared in section 202(a) of the act."

And in *Overland Freight Lines Extension*, 69 M.C.C. 143, 148 (1956), where a contract carrier application was similarly opposed, the Commission said:

"From these and other facts of record, we cannot reasonably conclude that the services available to the interested shipper have been inadequate, or that, despite those available services, there is, or will be a need for a transportation service which applicant can provide but which other carriers cannot or will not provide."

There have been numerous denials of contract carrier authority prior to 1957, solely because of adequacy of existing common carrier service.[3]

[3] For example: *Carr*, 2 M.C.C. 263, 268-269 (1937); *Myers*, 3 M.C.C. 273, 275 (1937); *Kuczinski*, 4 M.C.C. 45, 46 (1937); *Castranova*, 6 M.C.C. 769, 770 (1938); *Eastern Shore*, 7 M.C.C. 173, 176 (1938); *Waldorf*, 8 M.C.C. 543, 545 (1938); *Stegall*, 9 M.C.C. 475, 476 (1938); *D'Agata*, 10 M.C.C. 149, 150 (1938); *Scott*, 11 M.C.C. 227, 228 (1939); *Hoy*, 14 M.C.C. 797, 799-800 (1939); *Hypes*, 16 M.C.C. 543, 544-545 (1939); *Foote*, 18 M.C.C. 161, 162 (1939); *Burwen*, 19 M.C.C. 644, 645-646 (1939); *Daum*, 22 M.C.C. 366, 367 (1940); *Brown*, 24 M.C.C. 315, 317 (1940); *Jorgensen*, 30 M.C.C. 459, 460 (1941); *Worm*, 32 M.C.C. 641, 644 (1942); *Hibbard*, 47 M.C.C. 311, 314 (1947); *Kilmer*, 53 M.C.C. 561, 570-571 (1951), 61 M.C.C. 147, 149 (1952); *Vidas*, 61 M.C.C. 439, 443 (1952); *Benson*, 61 M.C.C. 128, 130 (1952); *Guex*, 67 M.C.C. 224, 225 (1956); *Millard*, 68 M.C.C. 114, 116 (1956).

It is beyond question that for twenty years prior to 1957 the Commission followed the consistent principle of denying contract carrier applications where existing common carrier service was adequate. Nothing in the terms of the 1957 amendment would support a contention that the amendment tampered with that principle, and, indeed, the District Court does not base its holding in any respect upon the text of the amendment. It could not do so since, as we show in sub-part A, *supra*, the phrase of the amendment, "the effect which denying the permit would have upon the . . . shipper" and "adequacy of existing service" express inseparable concepts. The actual language of the amendment confirmed and continued the Commission's principle.

The amendment left unimpaired principles that had been developed by administrative and judicial construction before 1957. *American Trucking Associations* v. *United States, supra*, 364 U. S. 1. Because of the inseparableness of the effect of denial upon the shipper and adequacy of existing service, the adequacy test is assuredly one of the surviving principles.

In view of these considerations it was extraordinary and inadmissible for the Court to consult legislative history. However, that history not only does not support the District Court but instead affirmatively refutes its conclusion.

C.—THE LEGISLATIVE HISTORY OF THE 1957 AMENDMENT DOES NOT SUPPORT THE DISTRICT COURT'S CONCLUSION THAT THE FIVE CRITERIA OF § 209(b) BAR USE OF THE ADEQUACY OF EXISTING SERVICE TEST.

It is our position, for the reasons heretofore stated, that resort to legislative history is not permissible. But even if that history is consulted it does not support the District

Court's conclusion that the five criteria of § 209(b) bar use of the adequacy of existing service test; the history refutes that conclusion.

The amendment to § 203(a)(15) by the 1957 act should first be noted. This section defines contract carrier, and the amendment was occasioned by the decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409 (1956), that a contract carrier is free to enter into contracts with an unlimited number of shippers. S. Rep. 703, 85th Cong., 1st Sess., p. 3. The amendment changed the former definition by adding the qualification that a contract carrier operates

> ". . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Under the bill as introduced that qualification read:

> ". . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers." (S. Rep. 703 p. 2).

The amendment to § 209(b) as originally proposed would have added to the findings required for the issuance of a permit the following:

> ". . . that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." (S. Rep. 703 p. 3).

The entire original bill appears in the record of the Hearings Before the Senate Committee on Interstate Commerce on S. 1384, May 7, 1957, p. 6.

The amendments originally proposed were offered by the Commission. The contract carriers and other parties objected to them as unnecessarily stringent, and the Commission agreed to substitution of the provisions of the amendment that were enacted. (S. Rep. 703 pp. 6-7).

This is the legislative history upon which the District Court based its judgment that the adequacy of existing service test "is a test proscribed by the legislative history of the Interstate Commerce Act." (R. 406; 188 F. Supp. 165-166).

It is of course true that the deleted provisions would have authorized the Commission to deny the Reddish application. But it does not follow that the Commission lacks the power under the bill as passed to deny on the ground that existing service is adequate. Actually the amended act with the five criteria of § 209(b) confers much broader discretion than the proposed language; and the 4th criterion, the effect upon the shipper of denying the application, is inseparable from the adequacy of existing service test under a consistent line of court and Commission decisions over the past twenty years. The original terms would have required an *automatic* denial if it appeared that common carriers were willing and able to provide the service needed. As passed the Act does not require automatic denial, but it clearly does grant administrative discretion on a more comprehensive scale to deny an application in a proper case where, as here, authorization would adversely affect existing carriers and would not adversely affect shippers because existing service is adequate. The substitution of administrative discretion within the five criteria for the automatic denial originally proposed does not mean that the Commission is powerless to deny an application in a proper case under the specified criteria.

If Congress had intended to abolish the long standing adequacy of existing service test it would have made its intent clear. There is positive evidence that the Senate and House Committees on Interstate and Foreign Commerce that dealt with the 1957 amendment to § 209(b) were aware of the use of this test as the basis for denial of contract carrier authority and of its importance and necessity in the regulation of all classes of carriers. During the few weeks while the Senate and House Committees were considering the amendment to § 209(b) they were simultaneously formulating legislation that would make the adequacy of existing service test a standard to govern the issuance of freight forwarder permits under the Freight Forwarder Act, 49 U. S. C. § § 1001 *et seq.* As passed in 1942 the act forbade denial of a permit on the ground of adequacy of existing service of other freight forwarders. 56 Stat. 291-292; H. Rep. 1172 p. 22, 77th Cong., 1st Sess. In recommending the freight forwarder amendment for passage in 1957 both Committees stated as a reason therefor that the Commission had the power to deny contract carrier applications "on the ground that the existing service is adequate," and that this was a necessary power for the proper regulation of carrier service and ought to be extended to freight forwarders.[4] S. Rep. 542 p. 3, H. Rep. 880 p. 4, 85th Cong., 1st Sess.

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[4]The following sequence of events in the 85th Congress, 1st Session, is significant. On June 27, 1957, the Senate Committee recommended passage of the bill to amend the Freight Forwarder Act, S. Rep. 542, and on July 24, 1957, the same Committee recommended passage of the amendment to § 209(b) in the identical form in which it passed, S. Rep. 703. On July 25, 1957, the House Committee recommended passage of the freight forwarder amendment, H. Rep. 880, and on August 2, 1957, the same Committee recommended enactment of the bill passed by the Senate amending § 209(b), H. Rep. 970. The Senate passed the

In S. Rep. 542, respecting the freight forwarder amendment, the Senate Committee said (p. 3):

> "It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. . . .
>
> "Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied applications for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of additional service would result in needless and uneconomic duplication of existing facilities.
>
> "However, because of the provisions of section 410(d), the Commission has felt compelled to grant freight-forwarder permits without regard to these considerations. The Commission's interpretation of the statute was spelled out in *Lifschultz Fast Freight, Extension—West and Midwest* (265 I.C.C. 431 (1948)). The Commission placed great weight on section 410(d), being of the view that the purpose of that section—
>
> *is to assure that freight-forwarder applications shall not be denied as were motor contract carrier applications, on the ground that the existing service is adequate (265 I.C.C. 431, 440).*" (Emphasis added).

The House Committee Report, H. Rep. 880 pp. 3-4, contains similar statements.

The recommended legislation was passed, and it amended § 410(d) of the Freight Forwarder Act, 49 U.S.C. § 1010(d),

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freight forwarder amendment on July 3, 1957, and the contract carrier amendment on August 8, 1957. The House passed both amendments on August 14, 1957. 103 Cong. Rec. 10896, 14034-36, 14774-83, 14784-85.

to permit denial of a permit on the ground of adequacy of existing service of other freight forwarders, with an exception not here material. 71 Stat. 452; S. Rep. 542 pp. 2-3.

The simultaneous histories of the contract carrier and the freight forwarder amendments show explicitly that the Senate and House Committees knew of the long established practice of the Commission to deny contract carrier applications because of adequacy of existing service, that they considered this practice necessary for the proper regulation of carrier service, and that they intended to make it applicable to the Freight Forwarder Act. And nowhere in the history of the amendment to § 209(b) is any intent manifested to do away with that principle in connection with contract carrier applications; instead the intent is plain to retain as to contract carriers the principle that was extended to freight forwarders. It is inadmissible that the Committees who extended the principle to freight forwarders so clearly and in emulation of § 209(b) intended to repeal the principle as to § 209(b) without saying so.

The legislative history does not support the District Court's conclusion; instead it refutes that conclusion. Moreover, summing up the purpose of the bill as finally presented and passed Senate Report No. 703 said in its last paragraph:

> "Your committee is of the opinion that the public interest in a sound transportation system, and *particularly in a stable and adequate system of common carriage*, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed." (Emphasis supplied).

When the bill came before the Senate for action Senator Smathers, Chairman of the Surface Transportation Subcommittee of the Committee on Interstate and Foreign Com-

merce, made the following statement explanatory of the five criteria added to § 209(b):

> "This section is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this, the Committee is proposing to give the Commission more helpful standards than are contained in the present law." (103 Cong. Rec. 14036).

Assuredly, in the light of those statements it cannot be said that Congress intended to diminish any of the Commission's powers in respect to control over entry of applicants into the contract carrier business.

II.

THE COMMISSION'S FINDINGS WERE SUPPORTED BY THE EVIDENCE AND WERE REASONABLE AND PROPER AND THE DISTRICT COURT ERRED IN SETTING THEM ASIDE.

The administrative judgments of the Commission in this case and its evaluations of the various factors are well within the broad confines of power which § 209(b) delegates to the Commission to exercise in the light of its experience and special knowledge. The District Court erred in overturning them.

A.—GENERAL CONSIDERATIONS.

From 1948 to mid-1958 Steele Packing Company was shipping a large and increasing proportion of its products

in its own private trucks, and by 1958 it was moving about 80 per cent of its output in this way in 29 tractor-trailer combinations (R. 134-135, 157, 207-209). This traffic consisted principally of orders ranging from 3,000 (the minimum) to 10,000 pounds (R. 126). Of the 29 combinations, 13 were owned by Steele and the rest were leased to Steele by various owners (R. 157). Reddish had commenced leasing vehicles to Steele in 1953 with 3 combinations, and by 1958 Reddish was leasing 9 combinations to Steele under one-year leases with provisions for cancellation by either party on 30 days notice (R. 50-52). Reddish maintained the vehicles and supplied gas, oil, and tires, and was paid on a mileage basis; and Steele hired, discharged, and supervised the drivers and carried public liability insurance on the vehicles (R. 50-52).

Early in 1958 Steele and its truck drivers had a labor dispute, and in March in an election supervised by the National Labor Relations Board the drivers voted to have the Teamsters Union as their bargaining agent, pursuant to which the Board so certified the Union (R. 158, 200). A further labor dispute was followed by a strike of the drivers and picketing of the Steele plants; and the strike has continued and Steele and the drivers have not entered into an employment agreement (R. 158-159, 169).

This strike was the moving cause, and the only cause, for the filing of the instant contract carrier application by Reddish; this is perfectly clear (R. 57, 159-161). The filing was made at Steele's suggestion and with Steele's support (R. 57, 160). Under his emergency and temporary contract carrier authority beginning in June, 1958, Reddish has been employing 19 drivers to operate his 9 combinations formerly leased to Steele (R. 52-53, 58). All of these are non union drivers (R. 72).

But the significant fact of the Steele strike and the resulting Reddish application is not the emergence of a device to frustrate the Union's bargaining efforts; far more important is the light these events and their background circumstances cast upon the principal evidentiary issues of the case.

Before 1940 Reddish assisted his father in the operation of the latter's motor common carrier business, performing every kind of job; and after 1940 he worked as a truck driver and mechanic and carrier of exempt commodities in his own 3 trucks until he leased the trucks to Steele in 1953 (R. 49-50). But with all this motor carrier background Reddish had never attempted to obtain motor carrier authority from the Interstate Commerce Commission until the Steele strike motivated Steele to induce him to seek it in this case (R. 44). Moreover, Steele had been performing extensive private carriage for 10 years, and had been leasing vehicles from Reddish for 5 years, but until the strike forced it to do so there is no evidence that Steele had ever entertained any idea of substituting for-hire carriage for its own private operation.

Thus when the strike curtailed Steele's long-standing transportation arrangements Steele was confronted with an emergency unlike any it had ever had, and one extremely distasteful to it. By reason of Steele's intense preoccupation with its private carriage operation and because of the practices it had followed in handling the portion of its outbound traffic that moved by motor common carrier, Steele was at the time of the strike almost wholly without knowledge of the motor common carrier transportation facilities available to move its traffic throughout its sales territory (R. 153-155, 185-188, 192-193, 201, 210-211, 375-380, 391-392). Steele had been turning over to Jones Truck Lines, Inc., of Springdale, a motor common carrier, the

traffic it shipped by motor common carrier, about 20 per cent of its output. When Jones' authorized routes did not reach the destination of the shipment, Steele had left entirely to Jones the arrangements for interline to destination, and Steele did not know nor care to know who the interlining common carriers were (R. 187, 192-93, 210-211). Steele used Jones because Jones' main office was in Springdale, and Steele was not interested in carriers not having an office in Springdale (R. 185, 187, 199).

In the strike emergency Steele turned to Reddish to take over the transportation formerly performed by Steele. Extensive motor common carrier service and rail service were available to Steele's sales territory (R. 270-363, 375-380, 391-392), but having no knowledge of it, and thinking only in terms of its private carriage operation, Steele made no investigation of it and did not try to use it (R. 153-155, 185-188, 192-193, 201, 210-211, 375-380, 391-392). It is obvious that Steele, having leased trucks from Reddish for 5 years for use in its private carriage, simply looked no farther than Reddish when because of the strike Steele had to find a substitute for its private transportation operations. With the habits of 10 years of private carriage Steele wanted to continue as nearly as possible in that course.

It will not do to say that Steele's experience with Jones had kept Steele informed as to the possibilities of motor common carrier transportation. There is no evidence to that effect, and what evidence there is in the record indicates the contrary; Steele was not interested in Jones' interlining problems or operations (R. 187, 192-193, 210-211). Moreover, Jones was neither a protestant nor a witness in this proceeding. There is a compelling presumption that Jones, the recipient of 20 per cent of Steele's traffic, lacked the urge to attempt to induce Steele to abandon its cherished

private carriage, or its substitute therefor in Reddish, in favor of motor common carriage. And of Jones' experience and ability in handling transportation problems the record is silent.

Steele's witness testified to the need of Steele for service on the traffic formerly handled in Steele's private trucks, that the customers receiving the small orders, 3,000 to 10,000 pounds, often work on 10-days supply, that they often specify the day and even the hour of delivery, that this service is necessary to meet competition, that less-truckload common carrier service is too slow (R. 125-128, 133-135). But as the Commission found, this testimony does not prove a need for a new service where, as clearly appears, Steele is wholly unacquainted with most of the motor common carrier services available in Steele's extensive sales territory and has made no substantial attempt to find out what these services can do (R. 153-155, 185-188, 192, 201, 210-211, 375-380, 391-392), and where, as here, existing carriers have shown that they can give Steele adequate service (R. 270-363, 375-380, 391-393).

Cain and Keystone before the Steele strike sold most of their output, 85 and 75 percent respectively, to Steele who furnished the transportation for its purchases (R. 214, 238-239). They are obviously looking to Steele and following Steele's leadership to obtain transportation to replace that curtailed by the strike. Cain did not arrange for any transportation before the strike (R. 215) and has no knowledge of transportation services available in the territory it wants to serve (R. 224-226, 228, 229, 231). Keystone shipped 20 per cent of its output by motor common carrier (R. 243), but has no knowledge of transportation services available in most of the territory (R. 251-255, 258, 261, 266-267). As in Steele's case, they do not prove need for Reddish's proposed service where they have made no attempt to find out

what existing carriers can do and where such carriers have shown that they can furnish adequate service (R. 270-363, 375-380, 391-393).

The protesting carriers can furnish adequate service to the supporting shippers. Four of the protesting motor carriers serve the origin points and can serve many of the destination states directly (R. 274-276, 289-291, 315-316, 322-325). By interline with other protesting motor carriers they can provide service to many other states (R. 375-376, 275, 279, 289, 302-305, 309-311, 316, 324-325, 337-341, 349-352). The motor carriers have equipment constantly available, operate daily schedules, and are performing satisfactorily for other shippers the type of service that the supporting shippers want including split-load, multiple pick-up, and stop-off in transit (R. 277-279, 290-292, 303-305, 310-311, 316-317, 322, 325, 340, 354). They can likewise furnish adequate service on the inbound freight (R. 275-276, 291, 304, 311, 317, 326, 340-341, 354). The protesting railroads on their own lines and by interline with other railroads operate extensively throughout the involved territory and can furnish outbound and inbound service (R. 144, 207, 243, 251, 330-331, 335-336, 360, 362-363, 880-381, 392).

Based on this evidence and in conformity with § 209(b) the Commission made the findings upon which it denied the application. It is clear that these findings are supported by the evidence and that they are within the scope of the administrative power delegated to the Commission. The District Court erred in setting them aside.

B.—THE FINDING THAT THE SERVICE PROPOSED CAN BE PERFORMED ADEQUATELY BY EXISTING MOTOR COMMON CARRIERS AND RAIL CARRIERS.

In considering the second criterion of § 209(b), "the na-

ture of the service proposed," the Commission found (R. 393, 81 M.C.C. at 41):

> "Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stopoff in transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted."

C.—THE FINDING THAT DENIAL OF THE APPLICATION WOULD NOT ADVERSELY AFFECT THE SUPPORTING SHIPPERS.

On this the Commission found (R. 394, 81 M.C.C. at 41-42):

> "Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially

> those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

In respect to the two foregoing findings the District Court said (R. 405; 188 F. Supp. at 165):

> "Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application."

In this conclusion the Court substituted its own judgment for that of the Commission in the area of administrative discretion bestowed by § 209(b) exclusively upon the Commission. Applicable here is the familiar principle expressed in *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946):

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the

business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

D.—THE FINDING THAT A GRANT OF AUTHORITY WOULD ADVERSELY AFFECT EXISTING CARRIERS.

The Commission found (R. 394, 81 M.C.C. at 41):

"It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport* case, *supra.*" [79 M.C.C. 695]

The District Court said (R. 410, 188 F. Supp. at 167):

"In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

"Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traf-

fic but would not handle it if the permit were denied."

The statement that the protesting carriers would not handle the traffic if the permit were denied refers to the testimony of shippers that if the Reddish application is denied they would return to private truck operation for the traffic in question (R. 390).

Assertions of this kind by shippers are not ground for granting an application nor for assaying the effect of a denial upon protesting carriers. If it were a shipper could dictate to the Commission. On this point the Court said in *American Trucking Associations* v. *United States, supra,* 364 U.S. 1, 18:

> "... And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. ..."

E.—THE FINDING THAT THE COMPARATIVE LEVEL OF PROPOSED AND EXISTING MOTOR CARRIER RATES IS NOT A FACTOR TO BE CONSIDERED IN THIS CASE IN DETERMINING ADEQUACY OF EXISTING SERVICE.

The Commission said (R. 395, 81 M.C.C. at 42):

> "It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act."

The District Court said (R. 409; 188 F. Supp. at 167):

> "Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national transportation policy is to promote 'economical' service.
>
> "We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded."

That holding is mined heavily with charges for its own destruction. For nowhere in the record is there any showing that "the lower rates result from economies and advantages inherent in" Reddish's operations. There is a compelling inference that Reddish and the supporting shippers have achieved some economies by Steele's failure to make a contract with the striking Teamsters Union, certified as bargaining agent by the National Labor Relations Board, and the consequent operation of Reddish's trucks by non-union drivers (R. 158, 169, 72). But it seems doubtful whether this is the type of economy that is consistent with the District Court's statement. Moreover, there is no evidence, as distinguished from speculation, that Reddish's

rates would be lower than the rates that could be provided by existing carriers whose services the shippers are not even interested in investigating.

On this sparse record the District Court erred fundamentally in getting into the rates question at all. In *Texas & Pacific Ry. Co.* v. *Gulf, Colorado, & Santa Fe Ry. Co., supra,* 270 U.S. 266, 278, the Court said:

> "For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

In the District Court Reddish and other parties argued that contract carriage is a mode of transportation different from the common carrier mode. The Court mentions this point but does not decide it (R. 403). Irrespective of that question, Reddish has not shown that he can take advantage of the principle stated in *Schaffer Transportation Co.* v. *United States, supra,* 355 U.S. 83, 91:

> "The *ability* of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize." (Emphasis added).

If there is a key word in that declaration, it is "*ability.*" The mere proffer of a lower rate is not enough. There must be ability to carry on operations, that is, to pay the way, to live with it. The record is wholly devoid of any such showing by Reddish.

While not decided by the District Court, the question whether contract carriage is a separate mode may here be briefly considered. The expression in *Schaffer* was based on the national transportation policy which refers to "all

modes of transportation subject to the provisions of this Act." The Act is divided into four parts regulating rail, motor, and water carriers, and freight forwarders. The policy states the purpose of "preserving a national transportation system by water, highway, and rail, as well as other means." In § 5a(4), 49 U.S.C. § 5b(4), carriers are classified separately for the purpose of that paragraph as rail, pipe-line, motor, water, and freight forwarder. All of the statutory indicators show that these are modes of the policy, and that one of these explicitly identified modes is not divisible into two or more modes. Contract carriers regulated under Part II of the Act belong to the same mode as the common carriers subject to that part.

In *Schaffer, supra,* the Court apparently approved the Commission's long standing practice of refusing to consider rates where motor carrier applicants seek to serve territory already served by other motor carriers, saying (355 U.S. at 91-92):

> ". . . The Commission asserts that it has always considered rates irrelevant in certification proceedings under § 207(a), yet, with but one exception, it relies on administrative decisions involving applications by a carrier to provide service to an area already served by the same mode of transportation.[7] Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an 'inherent advantage' of the competing type of carrier and cannot be ignored by the Commission."

"[7]Omaha & C.B.R. & Bridge Co. Common Carrier Application, 52 MCC 207, 234, 235; Pomprowitz Extension—Packing House Products, 51 MCC 343, 347, 348; Black Extension of Operations—Prefabricated

A week after *Schaffer* was decided the Court affirmed *per curiam* a district court decision sustaining the Commission's refusal to consider a rate question in a § 207(a) proceeding where the application was opposed by motor carriers. *Railway Express Agency, Inc.* v. *United States*, 153 F. Supp. 738 (1957), affirmed 355 U.S. 270.

This principle applies equally where a contract carrier seeks authority in an area served by motor common carriers. *Dixon and Koster Application*, 32 M.C.C. 1, 4 (1942); *Southland Produce Co. Application*, 81 M.C.C. 625, 628-629 (1959); *Motorway Corporation Extension*, 73 M.C.C. 731, 734 (1957), where the Commission said:

> "If a shipper desires contract carrier service simply as a way to obtain rates lower than the prevailing common carrier rates, and not because of material deficiencies in the existing common carrier service, it is clear that a permit should not be granted."

The Commission found upon ample evidence that the existing transportation services are adequate to serve the shippers' needs. That finding is clearly well inside the administrative province delegated to the Commission. In this situation the question of the comparative level of rates is not relevant. But even if it were relevant the record is lacking in any proof that Reddish's rates would actually be the lower rates. And, perhaps more important, there is no evidence of Reddish's ability to operate under lower rates.

Houses, 48 MCC 695, 708, 709; Johnson Common Carrier Application, 18 MCC 194, 195, 196; Wellspeak Common Carrier Application, 1 MCC 712, 714.

"In the one exception, Youngblood Extension of Operations—Canton, N.C., 8 MCC 193, the motor carrier's application was opposed by other motor carriers."

CONCLUSION

For all of the foregoing reasons the judgment of the District Court should be reversed and the cause remanded to the District Court with directions to dismiss plaintiff's complaint.

Respectfully submitted,

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APPENDIX

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., S. 1384, provides as follows (deletions by the amendment shown in brackets, additions made by the amendment in italics):

> The term "contract carrier by motor vehicle" means any person which, [under individual contracts or agreements], engages in [the] transportation *by motor vehicle of passengers or property in interstate or foreign commerce, for compensation* (other than transporation referred to in paragraph (14) and the exception therein), [by motor vehicle of passengers or property in interstate or foreign commerce for compensation] *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*

Section 209(b) of that Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-163, 85th Cong., S., 1384, provides as follows (deletions and additions made by the amendment are shown in the same manner as shown for Section 203(a)(15)):

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and

able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and *it* shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as* [are] *may be* necessary to *assure that the business is that of a contract carrier and within the scope of the permit, and to* carry out with respect to the [operations] *operation* of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided,* [however,] *That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further,* That no terms, conditions or limitations shall *be imposed in any permit issued on or before the effective date of this proviso which shall* restrict the right of the carrier to substitute [or add] *similar* contracts within the scope of [the] *such* per-

mit; *or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.* [or to add to his or her equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.]

National Transporation Policy
(49 U.S.C. preceding § 1)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (September 18, 1940, 54 Stat. 899).